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SUPREME COURT U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 6235

ALBERT "BO" THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE

SOUTH CAROLINA SUPREME COURT

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QUESTIONS PRESENTED

1. Was the South Carolina Death Penalty Statute applied in Petitioner's case in such a manner as to constitute a violation of the Eighth Amendment's ban on cruel and unusual punishment?

2. Did the State of South Carolina, in its quest for a jury capable of imposing the death penalty, produce a jury uncommonly willing to condemn a man to die in violation of Petitioner's Sixth Amendment right to a fair and impartial jury?

3. Did the State of South Carolina, in denying Petitioner a change of venue, deprive Petitioner of life and liberty without due process of law?

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INTRODUCTION

The Petitioner, Albert "Bo" Thompson, respectfully prays that a writ of certiorari issue to review the judgment of the South Carolina Supreme Court entered in this case on November 23, 1981, on grounds that important questions of federal constitutional law are present on which there are conflicting decisions by the highest courts of other states and United States Circuit Courts of Appeals.

OPINION BELOW

The first opinion of the South Carolina Supreme Court appears as Appendix A. The "corrected" opinion is attached as Appendix B. The order of the South Carolina Supreme Court denying the petition for rehearing appears as Appendix C.

JURISDICTION

The judgment of the South Carolina Supreme Court was rendered on November 23, 1981. The Petitioner filed timely petition for rehearing which was denied on December 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(S. C. Code §§ 16-3-20 and 16-3-25 comprise the death penalty statute in South Carolina. Due to their length, these statutes are omitted here and attached as Appendix F.)

U. S. Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

U. S. Constitution, Amendment VIII:

> "Excessive bails shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

U. S. Constitution, Amendment XIV:

> "nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

The Petitioner was indicted by the Greenville County Grand Jury on July 10, 1980, in two separate indictments. Indictment No. 80-GS-23-1888 charged Petitioner with armed robbery and Indictment No. 80-GS-23-1809 charged that Petitioner murdered one George Tobia while in commission of robbery while armed with a deadly weapon.

On June 17, 1980, the State served defense counsel with notice of its intention to seek the death penalty on the indictments returned by the Grand Jury. On July 21, 1980, the Honorable William W. Wilkins, Jr., the 13th Judicial Circuit Solicitor, called the cases against Petitioner for trial. Petitioner moved for and was granted a continuance until September 22, 1980. Trial of the case was commenced before a jury on September 22, 1980, and was concluded on September 27, 1980. The jury found the Petitioner guilty of murder and armed robbery and sentenced him to death. The presiding Judge C. Anthony Harris, set the date of execution for February 2, 1981.

The South Carolina Supreme Court, in Opinion No. 21596, filed November 23, 1981, affirmed Petitioner's conviction and sentence of death (Appendices A & B). The Petitioner filed a Petition for Rehearing which was denied on December 22, 1981 (Appendix C). Application for stay of remittur was granted pending disposition of this Petition (Appendix C).

REASONS FOR GRANTING WRIT

I.

THE SOUTH CAROLINA DEATH PENALTY STATUTE WAS APPLIED IN PETITIONER'S CASE IN VIOLATION OF THE EIGHTH AMENDMENT AND IN CONFLICT WITH FURMAN v. GEORGIA.

In Gregg v. Georgia, 96 S.Ct. 2909 at Page 2917, this Court stated:

> "Petitioner's argument that the Prosecutor's decisions in plea bargaining or in declining to charge capital murder are standardless and will result in the wanton or freakish imposition of the death penalty condemned in Furman, is without merit, for the assumption cannot be made that prosecutors will be motivated in their charging decisions by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts; the standards by which prosecutors decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilty and sentence."

Prior to the trial of the Petitioner in this case, extensive plea negotiations were conducted between the State and attorneys for the Petitioner (TR Pages 1404 through 1406). These negotiations were brought about as the result of an indication by the Honorable William W. Wilkins, Jr., Thirteenth Judicial Circuit Solicitor, that the State would be receptive to plea negotiations. (TR pg. 1291, Line 21 through TR Pg. 1292, Line 3, also TR Pg. 1404, Paragraph 2). Petitioner's attorneys, feeling a sense of responsibility to keep their client informed of their discussions with the State, advised him to enter a plea of guilty. (TR Pg. 1284, Line 15 through TR Pg. 1287, Line 23). After a considerable amount of agonizing, Petitioner decided to plead guilty if the State would agree to a life sentence and this was communicated to the State on July 11, 1980, ten days prior to the date on which the trial had been scheduled to begin. (TR Pg. 1404, Paragraph 5) On Thursday, July 17, 1980, four (4) days before the trial was scheduled to commence and less than five (5) hours before the Petitioner was scheduled to enter his plea, the Petitioner's attorneys were advised that the State could not abide by the proposed agreement because the victim's family objected. (TR Pg. 1405, Paragraph 8 and TR Pg. 1287, Line 24 through TR Pg. 1288, Line 4) During all this time, Solicitor Wilkins had indicated that he would like to dispose of Petitioner's case by way of a guilty plea and life sentence. He maintained this position even up until the afternoon hours

on July 19, 1980, less than 48 hours prior to the time the trial was scheduled to begin. (TR Pg. 1287, Line 7 through Line 24) Thus it can be assumed that had the family been sympathic toward the Petitioner rather than vindictive, he would have received the life sentence. When the statute is applied, using such a standard, it flies directly into the face of this Court's holding in the case of Furman v. Georgia, 408 U.S. 238 (1972). It is capriciously, wantonly, and freakishly applied and is cruel and unusual in the same way as being struck by lightening is cruel and unusual.

II.

THE DEATH PENALTY WAS IMPOSED UPON PETITIONER BY A JURY SELECTED IN VIOLATION OR HIS SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

I. Introduction.

The changes in captial purnishment law that began with Furman v. Georgia, 408 U.S. 238 (1972), particularly with regard to the jury's role, have been considerable. However, Adams v. Texas, _____U.S._____, 100 S. Ct. 2521 (1980), made clear that Witherspoon v. Illinois, 391 U.S. 510 (1968), provides the only permissible way to distinguish among potential jurors on the basis of their beliefs and attitudes about capital punishment.

Witherspoon held that the jury could not be culled of all persons who revealed conscientious scruples or other opposition to the death penalty. Thus, under that case veniremen can be excluded for cause only if they make "unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt", 391 U.S. at 522-23 n. 21 (emphasis added.)

During the voir dire examination of prospective jurors, the trial judge in Petitioner's case disqualified a total of four (4) jurors for various reasons having to do with their opposition to capital punishment. Of these, none indicated that his feelings against capital punishment would prevent him from returning a verdict of guilty and with the

possible exception of juror White, none of the individuals indicated that they were "so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme." Adams v. Texas, supra. In Adams, the Court held that the constitution disentitles the State to execute a death sentence imposed by a jury from which such prospective jurors have been excluded.

The Court in Adams pointed out that a line of cases beginning with Boulden v. Holman, U. S. 478, 483-484 (1969) and continuing through Lockett v. Ohio, 438 U. S. 586, 595-596 (1978) established "the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless these views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Adams v. Texas, supra, at pg. 2526.

II. Disqualification of jurors Allen J. Ravan, Samuel P. Clayton, and Elizabeth F. Leaque violated the minimum constitutional standards set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), and for this reason, Petitioner's death sentence may not be carried out.

A) Juror Allen J. Ravan:

EXAMINATION BY SOLICITOR WILKINS (TR Pg. 747, Line 2 through TR Pg. 748, Line 14):

Q. And in that regard, let me ask you, are you opposed to capital punishment, generally speaking?

A. Mr. Wilkins, you've got me. I never had thought about it before. But, I would say yes.

Q. Does that mean that your feelings are such, Mr. Ravan, that if you were sitting on the jury, and an individual was convicted of a crime, for which the jury could give him capital punishment, or they could give him life, you would not be able to vote in favor of death by electrocution, you would have to vote for life inprisonment?

A. You mean, if the circumstances of a case that is given, relates directly to capital punishment, or to life imprisonment?

Q. Well, I mean this, assuming someone is guilty of a crime, let's say murder and armed robbery, for which the law says that capital punishment can be given by the jury, it doesn't have to be but it can be.

The jury then hears evidence from the State, trying to encourage the jury to invoke capital punishment. From the defense, trying to encourage the jury to vote for life imprisonment, and not vote for capital punishment.

A. I believe I would.

Q. So, regardless of what facts you heard about whether or not capital punishment should be imposed, or whether or not life imprisonment should be imposed, you would automatically vote then for life imprisonment?

A. No sir, I wouldn't automatic, I'd give it a lot of thought, but I wouldn't want to take nobody's life.

Q. Well, could you vote to take someone's life?

A. I don't believe so, I really don't.

Q. All right, sir, that means -- I think I hear you saying that regardless of the circumstances, not the circumstance of the crime and guilty or innocence, that's established, guilty. Regardless of what you hear about aggravation and mitigation, on the issue of what punishment to give, while you would consider both, you could not bring yourself to rais your hand and say "Electrocute him"?

A. No, sir, I don't believe I could. I really don't.

EXAMINATION BY MR. JONES (DEFENSE COUNSEL) (TR pg. 751, Lines 5 through 15):

Q. Would you be able to consider His Honor's charge on the law, consider, one, the death penalty on the one hand, and life on the other, could you consider the two alternatives?

A. Yes, sir, I understand what you're saying. But, it's like I'm saying, that the two alternatives to me would be that -- I would rather have a life sentence than I had the death sentence.

Q. I don't think there's anybody who might not rather have that. But, the question is, whether you can consider death versus

life?

A. Yes, I can consider that, yes. (See Witherspoon, P. 522 N. 21, infra)

EXAMINATION BY THE COURT (TR. Pg. 752 Line 17 through TR Pg. 753, Line 10):

Q. At that point, I would charge the jury the law and the circumstances under which they might return the death penalty. Does your opinion, and your belief, on the subject of the death penalty automatically prevent you from imposing the death penalty, no matter what evidence the State produces?

A. Yes, sir, I'm afraid so. That's the one thing that I was taught all my life, and I guess I've kinda hung to it since childhood, that "Thou shalt not kill". But, maybe the circumstances might be different, but with me, I don't think I could do it.

Q. All right, let me ask it another way, so I can be sure that I understand you and you understand me. Under the circumstances I've just explained to you, you and the other jurors would retire to consider the various evidence which has been presented to you. Would you be unwilling to vote for the death penalty under any circumstances, regardless of the facts that have been proven?

A. Yes, sir.

Q. All right, sir, you may be excused.

The voir dire examination of Mr. Ravan taken as a whole simply does not establish beyond question that this juror was "resolved to vote against the death penalty automatically and regardless of the evidence". Burns v. Estelle, 592 F. 2d 1297, 1300 (5th Cir. 1979), aff'd en banc 626 F. 2d 396 (1980). The juror's statement, "No, sir, I don't believe I could. I really don't", may indicate strong opposition to the death penalty, but it is ambiguous on its face, and cannot provide a basis for disqualification under Witherspoon. See State v. Bernard, 288 N.C. 321, 218 S.E. 2d 327, 330 (1975) (error to excuse juror who said he thought he would automatically vote against death penalty); State v. Patterson, 28 Ohio St. 2d 181, 277 N.E. 2d 201 (1971) (juror who repeated sixteen times that he did not think he could return a death verdict was properly qualified).

It is possible, of course, that further inquiry would have revealed an inflexible determination to vote against the death penalty in every case. But it is also possible, on the basis of this record, that further inquiry would have revealed some degree of flexibility in the juror's thinking. And since no further inquiry was conducted, the record does not support the disqualification. Burns v. Estelle, supra.

The Court should also note that at one point during voir dire, this juror stated that he would not automatically vote against the death penalty, (TR Pg. 748, Line 3). He then went on to state, "I'd give it a lot of thought, but I wouldn't want to take nobody's life." In Witherspoon at Page 515 N. 8, the Court compared a disqualified Witherspoon juror to jurors disqualified in Smith v. State, 55 Miss. 410, 413-414 and quoted from that case: "The declaration of the rejected jurors, in this case, amounted only to a statement that they would not like *** a man to be hung. Few men would. Every right-thinking man would regard it as a painful duty to pronounce a verdict of death upon his fellow man. ***For the error in improperly rejecting (these) two members of the special venire the case must be reversed."

Petitioner submits that the voir dire of Mr. Ravan indicated nothing more than an unwillingness to pronounce a sentence of death on a fellow human being as indicated by his response to the Court's final question. (TR Pg. 753, Lines 6 through 9). Through out the entire voir dire, he indicated that he could consider the two alternative punishments. "Just as veniremen cannot be excluded for cause on the ground that they hold such views (conscientious or religious scruples against death penalty), so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of

penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the fact and circumstances that might emerge in the course of the proceedings. If the voir dire testimony in a given case indicates that veniremen were excluded on any broader basis than this, the death sentence cannot be carried out even if applicable statutory or case law in the relevant jurisdiction would appear to support only a narrower ground of exclusion." Witherspoon, supra, at Page 522 N. 21.

B) Juror Samuel P. Clayton

EXAMINATION BY MR. WILKINS (TR Pg. 291, Line 15 through TR Pg. 293, Lines 17):

Q. So, simply, are you opposed to capital punishment?

A. Mr. Wilkins, when I got the letter about this, that's something I've been struggling with in my own mind. From a distance, I'm in favor of capital punishment, or have always verbalized that. But when I got the letter and heard the statement that you had made on TV, that you were going to seek the capital -- it came home to me personally.

And to be completely candid with you and with the Court, I don't really know. Now, that sounds ambiguous, but it is a struggle that is going on in my mind right now.

I would have, to be honest with you, a hard time raising my hand to put somebody to death at this particular juncture in my life. You know, that's completely candid.

Q. Well, I - - -

A. You know, up until I got the letter, I was in favor of capital punishment, but when it came down to a personal decision, I'm somewhat in a quandary and hate to answer the question that way, but that's the only way I can truthfully answer it.

Q. I understand. Assuming you were seated on this jury, and you hear the case, assuming the defendant is found guilty, under the law then the jury must decide whether capital punishment shall be imposed, or whether a sentence of life imprisonment should be imposed. If you were on this jury, can you vote to impose capital

punishment?

* * *

THE WITNESS, Mr. Wilkins, I think - - I have a serious doubt in mind that I could raise my hand to vote for capital punishment.

Q. (By Mr. Wilkins) Regardless of the facts of the case, and I appreciate your position, now don't get me wrong, but regardless of the facts of the case, are you saying to us as specifically as you can, that you would not support a verdict - - you would not vote in favor of capital punishment, as opposed to life imprisonment?

A. Yes, I'm saying that.

Q. That you would vote in favor of life imprisonment, not capital punishment?

A. If my understanding of life imprisonment means life imprisonment, but that's almost a mute decision, because I would have great difficulty voting that way.

Q. You need to answer this question as specifically as you can.

A. Yes, I don't thing I could. I do not think I could vote for it.

Q. You do not think you could vote in favor of capital punishment?

A. That's right.

Q. Period?

A. Period.

EXAMINATION BY MR. JONES (TR Pg. 294, Lines 3 through 19):

Q. And, if the law, as he gives it, tells you that you can consider the implementation of the death penalty, or you have the alternative of a life imprisonment, could you consider capital punishment, if he charges you that's your two considerations?

A. Certainly, I could consider it, but I don't think I could vote for it. You know, it would be something that I could run through my mind, but I don't really think that if a conflict to my personal ethic and the law came about that I would yield to my personal ethic, as opposed to law, as written by State legislators.

Q. The Court does not ask you to yield to the law versus your ethics, the Court only asks that you consider the various options, you consider the death penalty and you consider life imprisonment, and you've indicated you could consider the two, is that correct?

A. Yeah, I could consider it.

EXAMINATION BY THE COURT (TR Pg. 294, Line 15 through TR Pg. 299, Line 3):

THE COURT: If the jury determines that the defendant is guilty of murder, it would then hear further evidence in a completely separate proceeding. You would hear evidence from the Solicitor and from the defendant, relative to the purnishment which is going to be imposed upon the defendant. One of those punishments might be the electric chair, if certain circumstances have been proven by the State.

Would your opinion, or your belief, or your personal ethic, as you described it, on the subject of the death penalty, automatically prevent you from voting to impose the death penalty, no matter what evidence the State presented?

A. Yes, sir, I think it would.

THE COURT: All right, sir, this gentleman is excused for cause.

The statements of Mr. Clayton like those of Mr. Ravan concerning capital punishment were always qualified. While he was somewhat opposed to the death penalty, his responses, like those of Mr. Ravan, simply indicated a reluctance to impose the ultimate punishment on a fellow man and certainly do not absolutely exclude the possibility that he would vote to impose it in a case which he found to be sufficiently aggravated. It's certainly more than worthly of note that this juror stated: "From a distance, I'm in favor of capital punishment . . . ." His exclusion was, therefore, in violation of Witherspoon.

Neither the voir dire of Mr. Ravan, nor that of Mr. Clayton, when considered in its entirety, can be said to have made "unmistak-

bly clear that [the jurors] would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them." Witherspoon v. Illinois, 391 U.S. 510,522 n. 21 (1968) (emphasis in original). What a juror "thinks" he could or would do cannot be substituted for the unmistakable and unambiguous expression of an abiding determination which is required by Witherspoon.

Each of these jurors may well be presumed from this record to be somewhat opposed to the death penalty. But "[it] is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a juror and to obey the law of the State." Witherspoon v. Illinois. 391 U.S. 510, 516-7 n. 7 (1968). The voir dire examination of jurors Ravan and Clayton does not unambiguously exclude this possibility, and thus their disqualification requires that Petitioner's sentence of death be set aside. Adams v. Texas, supra, at Pg. 2526.

C) Juror Elizabeth F. League:

EXAMINATION BY MR. WILKINS (TR Pg. 371, Line 2 through 12):

Q. Let me ask you this, are you opposed to capital punishment.

A. Yes, I am.

Q. Is your opposition such that you would not impose or vote to electrocute somebody, regardless of the circumstances?

A. I don't think I could.

Q. If you were asked to vote between life imprisonment and electrocution, would you vote for life imprisonment?

A. Yes, I would.

Q. Period.

A. Uh-huh.

EXAMINATION BY MR. JONES (TR Pg. 373, Lines 2 through 23):

Q. Are there different kinds of cases -- excuse me. There are different kinds of cases, would you agree with that?

A. Yes.

Q. And there are some cases that there -- involve violence, some cases don't involve violence. Some cases involve more violence than others?

A. Yes.

Q. Are there cases where you could apply the law as the Judge gives it to you, where you could apply the death penalty or life imprisonment?

A. Say that again.

Q. Could you consider, if you were asked to consider whether in this case, Albert Thompson received the death penalty or he received life imprisonment, could you consider the two options?

A. Yes.

EXAMINATION BY COURT (TR Pg. 375, Lines 6 through 14):

Q. Yes, Mam, and then I'm asking you, if that has been decided by you as a member of the jury, that he is guilty, you would then hear evidence as to whether he should be electrocuted or given life imprisonment. And I'm asking you, would your belief, your personal religious belief, as you yourself couched it, on the subject of the death penalty, automatically prevent you from voting to impose the death penalty on this defendant, no matter what evidence the State presents?

A. Yes, I think it would.

Q. All right, Mam, you may be excused.

Although somewhat more settled in her opposition to the death penalty than Messrs. Ravan and Clayton, in that she had made a previous decision on the issue, Ms. League too was qualified under Witherspoon. The voir dire taken as a whole simply indicates a citizen who would "hate to impose the death penalty because I think it's against my religion". (TR Pg. 373, Lines 14 and 15.)

"[It] cannot be assumed that a juror who describes himself as having 'conscientious or religious scruples' against the infliction of the death penalty or against its infliction 'in a proper case' (cite omitted) thereby affirms that he could never vote in

favor of it or that he would not consider doing so in the case before him. (Cites omitted.) Obviously, many jurors could, notwithstanding their conscientious scruples [against capital punishment], return *** [a] verdict [of death] and *** make their scruples subservient to their duty as jurors'. (Cite omitted.)" Witherspoon supra, at Page 515, N. 9.

III. Notwithstanding that the disqualification of these jurors may have been proper under Witherspoon, their exclusion certainly cannot be squared with the interpretation of Witherspoon, as set forth in Adams v. Texas, _____ U.S. _____, 100 S.Ct. 2521 (1980).

A) Juror Allen J. Ravan

EXAMINATION BY COURT (TR Pg. 745, Lines 15 through 21):

Q. Would you have any -- would you foresee any difficulty, from your own personal standpoint, of listening to the trial of the case, if you were accepted as a juror, listening to what was said from the witness stand under oath, and then taking the law as I give it to you, and rendering your verdict strictly on what happens in that courtroom?

A. No, sir.

EXAMINATION BY MR. JONES (TR Pg. 749, Lines 18 through 22):

Q. Would you have any hesitation, or would you be able to follow the Judge's instructions at the guilty or innocent stage, and make a decision whether or not Albert Thompson is guilty or innocent of the charges?

A. Oh, yes, I could do that, yes.

(And at TR Pg. 751, Lines 5 through 15):

Q. Would you be able to consider His Honor's charge on the law, consider, one, the death penalty on the one hand, and life on the other, could you consider the two alternatives?

A. Yes, sir, I understand what you're saying. But, it's like I'm saying, that the two alternatives to me would be that -- that I would rather have a life sentence that I had the death sentence.

Q. I don't think there's anybody who might not rather have that. But the question is, whether you can consider death versus life?

A. Yes, I can consider that, yes. (See Witherspoon, Pg. 522 N. 21, supra.)

B) Juror Samuel P. Clayton:

EXAMINATION BY THE COURT (TR Pg. 290, Lines 24 through TR Pg. 291, Line 6):

Q. If you were selected by both attorneys to serve as a juror on the case, would you have any problem whatsoever being seated at the commencement of the trial with a completely open mind and listening to the evidence, which is presented at that trial and then applying the law as I will give it to the jury, and rendering a verdict based on that evidence and that law?

A. No, sir, I don't think I would.

EXAMINATION BY MR. JONES (TR Pg. 293, Line 24 through TR Pg. 294, Lines 19):

Q. As I understand it, you told His Honor, when he asked the questions earlier, that you could apply the law as he gives it to the facts, of any case on which you sat, is that correct?

A. Yes, sir, that's my understanding, yes sir.

Q. And, if the law, as he gives it, tells you that you can consider the implementation of the death penalty, or you have the alternative of a life imprisonment, could you consider capital punishment, if he charges you that's your two considerations?

A. Certainly, I could consider it, but I don't think I could vote for it. You know, it would be something that I could run through my mind, but I really don't think that if a conflict to my personal ethic and the law came about, that I would yield to my personal ethic, as opposed to law, as written by State legislators.

Q. The Court does not ask you to yield to the law versus your ethics, the Court only asks that you consider the various options, you consider the death penalty and you consider life imprisonment, and you've indicated you could consider the two, is that correct?

A. Yeah, I could consider it. (See Witherspoon, Pg. 522, N. 21, supra.)

C) Juror Elizabeth F. League:

EXAMINATION BY MR. JONES (TR Pg. 372, Lines 12 through 23):

Q. Are there cases whereyou could apply the law as the Judge gives it to you, where you could apply the death penalty?

A. I would hate to impose the death penalty, because I think it's against my religion.

Q. Could you consider whether or not, in certain cases, whether or not to apply the death penalty or life imprisonment?

A. Say that again.

Q. Could you consider, if you were asked to consider whether in this case, Albert Thompson received the death penalty or he received life imprisonment, could you consider the two options?

A. Yes. (See Witherspoon, Pg. 522, N. 21, supra.)

"In Boulden v. Holman, 394 U.S. 478, 483-484 (1960) we again emphasixed the State's legitimate interest in obtaining jurors able to follow the law:

> '[I]t is entirely possible that a person who has a fixed option against or who does not believe in capital punishment might nevertheless be perfectly able, as a juror, to abide by existing law--to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case.'

And in Lockett v. Ohio, 438 U.S. 586, 395-396 (1978, we upheld against a Witherspoon challenge the exclusion of several jurors who were unable to respond affirmatively to the following question:

> 'Do you feel that you could take an oath to well and truly [sic] try this case . . . and follow the law or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?'

This line of cases establishes the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that

jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the Court." Adams v. Texas, supra. Petitioner submits that his simply means that a State has a legitimate interest in acquiring jurors who are not so opposed to imposition of capital punishment as to frustrate its legitimate efforts to administer its laws.

However, the Constitution disentitles the State to execute a sentence of death imposed by a jury from which prosepctive jurors have been excluded who are not so irrevocably opposed to capital punishment as to frustrate the State's legitimate efforts to administer its constitutionally valid death penalty scheme. Adams v. Texas, supra.

> "[I]f prospective jurors are barred from jury service because of their views about capital punishment on 'any broader basis' than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. Adams v. Texas, supra, at Page 2527.

IV. The trial judge refused to excuse two (2) prospective jurors who, during voir dire examination, had indicated an unwillingness to vote for a life sentence in Petitioner's case.

The voir dire examination of potential juror Heyward R. McCall, when taken as a whole, made unmistakably clear that should the State prove Petitioner guilty of murder in the commission of armed robbery beyond a reasonable doubt, he would automatically vote for the death penalty. (TR Page 720, Lines 1 through 5 and TR Page 721, lines 8 through 12). This juror "fell woefully short of that impartiality to which the Petitioner was entitled under the Sixth and Fourteenth Amendments." Witherspoon, supra, at Page 518.

The Court further erred in its effors to rehabilitate this pro-death juror. The Court stated at Page 721, Line 4 of the transcript: "The defendant would put in any evidence which he wishes to whatsoever, which they think would convince you to sentence him to life imprisonment." Thus, the implication was that the Petitioner would present evidence in mitigation. If the Court were going to rehabilitate this juror, he should have further questioned him concerning his vote on the life imprisonment alternative in the

event Petitioner did not put up any evidence in mitigation, and the State proved one or more aggravating circumstances beyond a reasonable doubt.

"We have interpreted this State's death penalty statute to require the Trial Judge instruct the jury that it could effectively impose life imprisonment instead of death even if it found one or more statutory aggravating circumstance(s). State v. Woomer, Opinion No. 21442 (S.C. Sup. CT. filed 4-28-81). Thus, the Court failed to determine whether or not the juror could grant the Petitioner his life under these circumstances. If effect, the Court told this juror that the burden was on Petitioner to present evidence which would convince him (the juror) to spare Petitioner's life.

The following voir dire of juror Erma P. Prickett indicated that she too "fell woefully short of that impartiality to which the Petitioner was entitled under the Sixth and Fourteenth Amendments." Witherspoon, supra.

EXAMINATION BY MR. GREENE (TR Page 597, Line 18 throught TR Pg. 601, Line 18):

Q. Tell me how you feel about capital punishment.

A. I think there are definitely cases where it is deserved. Our society runs by certain rules and if people break those rules they should pay a penalty. And, depending on what rules they break, depends on the penalty.

Q. In what type situations would you impose the death--would you believe the death penalty should be imposed: You said there's some circumstances.

A. For someone for murder, that would be the main one. There may be other things that I would think it would be a good sentence for, also.

Q. In a situation where death occurred while in the commission of an armed robberty, would that be one of the areas you would consider ---

A. Yes.

Q. And do I understand that it were established that the armed robbery occurred and murder, and death ensued as the result of that, you would vote the death penalty?

A. Yes, I would.

Q. You don't have any question about that?

A. No.

Q. In those circumstances where there's an armed robbery and death as a result of the armed robbery, as a part of it, regardless of exactly how it came about, your vote would be for the death penalty?

A. I believe it would.

(TR Pg. 601, Line 3)

Q. As I explained to you when we first started talking this is a case in which the Solicitor is seeking the death penalty.

A. Yes, sir.

Q. And I asked you to be as candid with me as you can, which you already have been. If, in a situation where it was proven beyond any doubt, by the tremendous weight of the evidence, that a man who was charged with murder and armed robbery was, in fact, guilty of murder while in the commission of armed robbery, do I understand that your vote would be for the death?

A. Yes, sir.

Q. And, while the Court would give you the option of choosing between life and death, in all fairness, your vote would definitely be for death?

A. Yes, sir.

EXAMINATION BY THE COURT (TR Pg. 603, lines 12 through 23):

Q. I also tell you this, then, that in the charge, no matter what the evidence, I would instruct the jury that you may return a verdict of life imprisonment, if in your best judgment that is the purnishment which he should receive, no matter what the Solicitor introduces as evidence.

A. Right.

Q. Does your opinion relative to the desirability, the feasibility of the death penalty in South Carolina, would it prevent

you from going into you jury room and considering the evidence that has been presented, in light of my charge that a juror may return a verdict of life imprisonment, regardless of any evidence presented by the Solicitor, would it prevent you from giving serious consideration, or from returning a vote of life imprisonment in this case?

A. It would not prevent me from giving it serious consideration. However, I feel that if it has been proven to me that he was guilty, that I would vote for the electric chair.

FURTHER EXAMINATION BY THE COURT (TR Pg. 611, Lines 14 through 24):

The defense will present such evidence as it wishes to, on mitigating circumstances, which they wish to impress upon you as being a reason for not imposing the death penalty on this young men.

You would then retire to consider your verdict.

Q. Depending upon the evidence which has been presented at that state of the trial, could you vote for life imprisonment in this case.

A. I could, yes.

Q. All right.

A. Depends on the mitigating circumstances.

This juror's attitude was best expressed by this last colloquy. She was adamant to the end about imposing the death penalty on a convicted murderer. The Trial Judge himself best summed up her feelings at TR Pg. 612, Line 10, when he stated: "All you have here is a witness who's strong for law and order, and who says 'you'd better show me an awful good reason not to put him in the electric chair',...."

Petitioner submits that the burden does not shift to him once the State has proven one or more aggravating circumstance to put up some evidence in mitigation to convince a jury to impose a life sentence. In rehabilitating both of these pro-death jurors, the Court erred in stating that there would be mitigating evidence introduced by Petitioner.

The Petitioner would invite this Court to compare the Trial Judge's efforts to rehabilitate these two jurors with his efforts to rehabilitate the four (4) who were excused for their opposition to capital punishment. Petitioner submits that it is evident from such comparison that those jurors who expressed some opposition to imposition of the death penalty were excused by the Judge while those who expressed pro-death sentiments were found qualified. Whether this was intentional or unintentional on the part of the Trial Judge, it resulted in the same effect - a jury weighted in favor of imposition of capital punishment as opposed to a jury neutral on this issue. In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. No defendant can constitutionally be put to death at the hands of a tribunal so selected.

"Whatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the Constitution. The State of Illinois has stacked the deck against the Petitioner. To execute this death sentence would deprive him of his life without due process of the law." Witherspoon, supra, at Page 523.

Petitioner submits that by failing to exclude these two jurors and by excluding those four (4) previously discussed, the State of South Carolina stacked the deck against him and to execute his death sentence would deprive him of his life without due process of law.

III.

THE SUPREME COURT OF SOUTH CAROLINA HAS DECIDED THE FAIR TRIAL ISSUE IN DISREGARD OF THE PRINCIPAL OF IRVIN V. DOWD AND RIDEAU V. STATE OF LOUISIANA.

The Supreme Court of South Carolina has adopted a rule in dealing with pre-trial publicity that in effect, precludes any real inquiry into the facts of a particular case. That rule, as stated in the opinion below, is as follows:

"Where the Trial Judge bases his rule on adequate voir dire examination of the jurors, his conclusion will not be disturbed absent extraordinary circumstances." The Trial Judge found the members of the jury to be impartial by reason of their promise to follow his instructions and render the State and the Defendant a fair trial. The Supreme Court of South Carolina accepted the Trial Judge's finding without any real inquiry into the facts of this particular case. That there was no real inquiry into the pre-trial publicity facts of this case is apparent when one compares the language of the opinion to the record. While the Court below dismissed Petitioner's claim of error in one paragraph, the record reflects numerous exhibits and testimony which were fully briefed for the Court showing a pattern of State generated publicity carefully orchestrated to deny the Petitioner a fair trial. The Court below made only one reference to the pre-trial publicity facts, that being "that several newspapers and radio stations reported the incident". There certainly was a tremendous amount of newspaper, television, and radio coverage. The alleged incident was, however, described in quite different terms. What really happens is as follows:

On July 10, 1980, Petitioner was indicted by the Greenville County Grand Jury with the charge of armed robbery and murder. One day before, July 9, 1980, Appellant had been convicted of armed robbery in the adjoining Court of Pickens. On July 17, 1980, the State had served defense counsel with its intention to seek the death penalty. Counsel herein had been representing Appellant one day when the notice was served. Between the receipt of the notice and while attempting to prepare to represent the Petitioner in his

death penalty case, which had been set for trial on July 21, 1980, the State forced the Appellant to trial in Pickens County on the armed robbery charge. The events surrounding the Pickens trial and the death penalty trial were fully covered by both newspaper and radio. The State does not contest that the newspaper and radio stations that covered these events fully blanketed both Greenville and Pickens County. Publicity fully detained Appellant's conviction of armed robbery, his arrest in New Jersey and extradition fight, the related hearings pertaining to both the armed robbery and pending death penalty trials, including a confrontation with the press at Appellant's preliminary hearing, and the action on the part of Appellant's counsel to obtain the disqualification of the Judge who had heard the Pickens case and who was to try the death penalty case. When the death penalty case was called on July 21, 1980, Appellant moved for, and was granted a continuance until September 22, 1980. A change of venue (other than the adjoining County) was requested but denied. Counsel had been in the case for approximately 34 days when the events occurred in July. Between the publicity in July and following the continuance, the news media was particularly quiet concerning the Defendant. In fact, nothing was said pertaining to the Appellant's death penalty case until three days before he was to go on trial for his life on September 22, 1980. On Wednesday night, September 17, approximately 11:15 p.m., the Appellant was served with a warrant charging him with assault and battery with intent to kill resulting from an incident which had allegedly occurred on Monday, September 15, 1980, in the Detention Center. WFBC Television, the Channel 4 NBC affiliate, broke the story and predominated in its coverage. There is no contest on the part of the State that WFBC AM and FM radio and television stations are major stations in the Greenville area. There are seven stories that were aired on the radio stations, AM and FM on September 18th and 19th. Stories referred to the Petitioner by name, and stated that he and another had been charged with "beating and stabbing another prisoner", that he was "already serving time for armed

robbery and was going on trial for armed robbery and murder on Monday". The stories also referred to the Petitioner "beating another inmate" and that the "beating occurred Monday, and that Stewart was hospitalized and could not give a statement until Wednesday night . . . Thompson is already serving a prison term for a Pickens County armed robbery". A police captain, by the named of Earl Watson, granted an interview to the station explaining why it had taken three days to file charges and this interview was carried along with the stories. On Monday morning, September 22, 1980, the date set for the beginning of jury selection, these stories continued. "News stories last week told of convicted armed robber, Albert "Bo" Thompson, getting arrested for allegedly beating and stabbing a cell mate in the county jail, well, Thompson's lawyer, Tom Greene, argues that his client cannot get a fair trial because the stories have prejudiced prospective jurors. Thompson has already been convicted of a Pickens County armed robbery, and today's trial is on the 1978 armed robbery-murder of a Simpsonville grocer, George Toubia." The stories also stated that "It was the second time the trial was slated to start, because Thompson's lawyers got a continuance two months ago and there could be more delays today." Other stations in the same geographic area carried stories referring to the "stabbing incident" and reminded listeners that Thompson was to go on trial in a few days for his life for the murder and armed robbery. The local newspaper, on September 18th and 19th, 1980, carried stories relating to the detention center incident as " a stabbing attack" and referred to the use of a "dagger". Another article in the Greenville News captioned, in "Thompson Trial - Venue Change Sought" and outlined for the reader the alleged attack on the prisoner in jail and the pending death penalty trial. The newspaper articles reminded the readers of Appellant's extradition from New Jersey, particulars of the crime for which he was to go on trial and the July 9, 1980, Pickens conviction of armed robbery. On September 23, 1980, the Greenville News, in a article captioned, "Judge Refuses to Move Thompson Trial", outlined the assault with the intent to kill charge, stated that the

Judge described the charges as "straightforward, factual reporting as the news media can do". The story, run by WFBC Television on the 6:00 o'clock and 11:00 o'clock news on Thursday evening, September 18, 1980, was their lead story and contained, in addition to narration by a reporter, a video tape of the Appellant walking through the lobby of the Law Enforcement Center in prison clothes, smiling with a cigar in his mouth, his hands in cuffs, and being accompanied by an officer and counsel, this being filmed in the lobby of the Greenville County Law Enforcement Center. The reporter who obtained the story received her information from a confidential source and refused to reveal that source. The Trial Court sustained her refusal, over counsel's objections, maintaining that she had the right to so refuse. The same captain that had given the interviews, also told her where to stand with her camera to obtain pictures of the Defendant. For the Supreme Court of South Carolina to say that "he (the Petitioner) and an inmate were involved in an altercation" and that several newspapers and radio stations reported the incidents clearly establishes that the Court disregarded the effect of the actual publicity on potential jurors. The statement of the South Carolina Supreme Court that the Petitioner was involved in an altercation in effect amounts to a finding of fact that he did in fact engage in such altercation, when it has never been proven in any Court at any time, that the Petitioner did, in fact, do anything. In fact, when counsel attempted to demonstrate to the Trial Court that the allegations were grossly untrue, the Trial Judge made it clar that such would not be tolerated by simply stating that he was not going to try an assault and battery case before he tried the death penalty case.

The likelihood of further violence from the Defendant, not only after possible parole but within the prison system itself, is a major consideration for death penalty jurors when they are deciding whether or not to grant life. It would, therefore, be difficult to imagine a more damaging charge than that brought against the Defendant just hours before going on trial for his life. It should also be remembered that at this time jurors for the case

had their jury summons in hand and knew that they might serve. It should also be noted that all of these events, starting with the initial trial date, are directly traceable in one way or another to the State of South Carolina, and if closely examined, demonstrate a consistent pattern on the part of the State to create an environment calculated to insure the imposition of the death penalty. It was the Solicitor who called Petitioner's cases as described. It was the State of South Carolina who brought the assault and battery with intent to kill charge within a matter of hours before the Appellant was to go on trial for his life. Police Captain Watson was actively involved in disseminating the information concerning the alleged incident, information that was both inflamitory and inaccurate and that the Appellant was never given an opportunity to refute. It is also clear from the record that, having made the charge within a few hours of the time that the Appellant was to go on trial for his life, someone described as a "confidential source" made sure that the local television station knew of the event. Under these circumstances, the Trial Court should have automatically granted a continuance or changed the venue without further inquiry. As one looks at the voir dire, it should be kept in mind that jurors are reluctant to admit prejudice and in any instances, are unaware of the impact of what they know until it is too late. The jurors who signed Petitioner's death warrant were far from unaware of the publicity, as can be seen by an examination of their voir dire. Martha Childress heard that "he was to be tried and he was pleading innocent." Frances Collins heard about the incident when it first happened in July of 1978; that a man had been killed and robbed and that her husband and daughter had mentioned the name of the deceased and the Defendant". (The first time that the Appellant's name was publicly mentioned in connection with the murder and armed robbery of the deceased was approximately one year after the incident.) Elizabeth Dunson saw the newspaper coverage of the alleged assault in prison and motion of change of venue. When asked if what she read had any effect on her, she replied, "No, I don't think so." James Finch remembered only reading the "headline in the paper"

when it first happened, yet he was able to associate Appellant's name with the incident which would be impossible if his only exposure was to the initial report. Faye Goodwin also read about the assault case at the Law Enforcement Center. Marg Gerwood remembered an article that she read after she received her subpeona, "just for what the trial was going to be, but that was all". Ilean Jackson recalled from the paper that a man had been killed and robbed, and the Appellant's name was connected with those events. Priscilla Wilson, when asked what she had heard or read, said, "Nothing since we've been down here, I 'aint hearded much about it, I haven't paid too much attention about it. . . ." Some of the jurors who did not serve were more candid about their reactions to the publicity. Their reactions are, it is submitted, normal and predictible and should be considered in evaluating the total probable impact of these events. James Lyon heard on the radio about the "fight" at the Law Enforcement Center, and said, "I guess it made the impression that he is capable of, you know, trying to kill someone....I guess it would always be in the back of your mind...." The juror also said that he assumed that what the radio report had said was true. (Court excused this juror.) Doris Culbertson saw the Appellant on television and her reaction was, "you saw someone who had been involved in a crime". Novice Johnson read in the paper concerning the Law Enforcement Center incident and described it, "Well, where he tried to kill another man, tried to stab this man". Lucille Floyd read and heard about the Law Enforcement Center incident and described her feelings, "I thought, gosh, you know, I'm surprised that that happened, since he already, you know, going to be tried for murder. I'm surprised that he would do that". When asked if she thought Petitioner had done what they though he had done, she replied yes. When asked her reaction to the film clip, she said, "I was suprised that he was smiling" and further stated that "I guess I thought he knew that they were, you know, the camera was on him, and I gues that I was surprised that he was smiling, you know, knowing that everybody in Greenville, or whoever, was watching television on Channel 4 was going to see him." Appellant submitted a number

of affidavits from Greenville County citizens as well as attorneys which stated that they did not believe that the Petitioner could be given a fair trial due to the publicity.

The twelve jurors who signed the death warrant knew about the case and admitted some exposure to the publicity in question. Two of the jurors knew about the alleged assault at the Law Enforcement Center.

The failure of the Supreme Court of South Carolina to consider the actual facts is a procedure that is in direct violation of the holding in Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639 (1961) at Page 1642, this Court stated that to hold that a mere existence of any preconceived notion as to guilt or innocence of an accused without more is sufficient to rebut the assumption of a prospective juror's impartiality is to establish impossible standards. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in Court . . . The adoption of such a rule, however, cannot foreclose inquiry in a given case where the application of that rule works for the depravation of a prisoner's life or liberty without due process of law. In Rideau v. Louisiana 373 U.S. 723, 83 S.Ct. 1417 (1962), this Court held that the refusal of a request for a change of venue was a denial of due process where a moving picture film with sound-track had been made of Defendant's confession of a crime for which he had been charged. The film in question had been televised three times and three members of the jury stated on voir dire that they had seen and heard the interview on at least one occasion. Notwithstanding their testimony that they could "lay aside any opinion, give the Defendant the presumption of innocence that is provided by law, base their decision solely on the evidence, and apply the law as given by the Court," (Rideau, supra, at page 1422) this Court held that the denial of a change of venue was a denial of due process of law. At least two jurors on Petitioner's jury knew about the alleged incident at the Law Enforcement Center, and the balance of the jury had substantial information concerning his many troubles.

While they all asserted their impartiality as did the Rideau jurors, it is submitted that a death sentence for the Petitioner from this jury violates the concepts of fundamental fairness and due process of law.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be issued to review the Order of the Supreme Court of South Carolina.

THOMAS W. GREENE
JERRY L. TAYLOR

BY: _____
Thomas W. Greene
Attorneys for Petitioner

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 6235

ALBERT "BO" THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

APPENDIX
TO PETITION FOR
WRIT OF CERTIORARI

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APPENDIX A

81 6235

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Albert "Bo" Thompson, ... Appellant.

Appeal From Greenville County
C. Anthony Harris, Judge

Opinion No. 21596
Filed November 23, 1981

AFFIRMED

Chief Attorney John L. Sweeny, of S. C. Commission of Appellate Defense, of Columbia; and Thomas W. Greene and Jerry L. Taylor, both of Greenville, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorney General Lindy P. Funkhouser and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Solicitor William W. Wilkins, Jr., of Greenville, for respondent.

HARWELL, A. J.: Appellant Albert "Bo" Thompson was tried by a jury in Greenville County and convicted of armed robbery and murder. Upon recommendation of the jury, he was sentenced to death. This case consolidates Thompson's direct appeal and mandatory review of the death sentence.

On July 10, 1978, George Toubia was shot and killed during the armed robbery of his small grocery store near Simpsonville, South Carolina. Appellant Thompson and two accomplices were arrested for the crimes. One of the accomplices pled guilty to accessory to murder and armed robbery, and the other pled guilty to murder and armed robbery.

Appellant asserts his convictions should be reversed and that he should be allowed to enter a guilty plea in return for a life sentence because of pretrial plea negotiations. Appellant sought an injunction against the State to prevent it from seeking the death penalty; the motion was denied. Appellant argues he had an enforceable agreement with the State for a sentence of life imprisonment. The State asserts that no agreement was ever reached; that in response to appellant's proposal to plead guilty, the solicitor advised appellant's counsel that he would consider a guilty plea only upon a firm commitment by the accused and that he would discuss the matter with the victim's family before he reached a final decision.

Appellant's attempt to create a firm commitment out of plea negotiations has no merit. Santobello v. New York, 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) states that "fundamental fairness" forbids the State from seeking the death penalty after plea negotiations. However, Santobello merely stands for the proposition that when an accused pleads guilty upon the promise of a prosecutor, the agreement must be fulfilled. Here, there was no promise made by the solicitor; there were merely negotiations.

Relying on Cooper v. United States, 594 F. 2d 12 (4th Cir. 1979) appellant argues that even though an express contract had not been reached, his expectations reasonably formed in reliance upon the honor of the government required that the State be enjoined from seeking the death penalty. In Cooper, a firmly advanced proposal had been made to the defendant by an Assistant U. S. Attorney but was withdrawn when the proposal was disapproved by the U. S. Attorney. The 4th Circuit Court of Appeals confined its holding as narrowly as possible to cases where the proposal was specific, unambiguous and made without any reservation. Any plea negotiations between appellant and the State were not specific or unambiguous; there were also two reservations: a firm commitment from the accused and a discussion with the victim's family.

THE STATE v. THOMPSON

Appellant excepts to the application of the Death Penalty Statute to his case. He asserts that S. C. Code Ann. 16-3-20(C) provides no guidelines for the weighing of aggravating and mitigating circumstances. He also argues that the scope of review of death penalty cases is too narrow (comparing only prior capital cases tried under the present death penalty statute) and therefore unconstitutional. Appellant contends that he has a right to access to the cases with which the Supreme Court compares each death sentence; however, Section 16-3-25 of the Code does not provide for the right. Next, he argues that the death penalty constitutes disproportionate punishment in his case. This argument is without merit. Upon entering Mr. Toubia's store to rob him, appellant immediately shot him once. Before leaving the store with the fruits of the crime, appellant shot him again. Appellant also contends that the death penalty was applied arbitrarily and capriciously because it was not sought for his two accomplices. These issues were decided adversely to appellant in State v. Linder, Smith's Advance Sheet, Opinion No. 21452, May 14, 1981 and State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799, cert. denied 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979), petition for rehearing denied 444 U. S. 1027, 100 S. Ct. 694, 62 L. Ed. 2d 662 (1980), and cert. denied 444 U. S. 1026, 100 S. Ct. 690, 62 L. Ed. 2d 660, petition for rehearing denied 444 U. S. 1104, 100 S. Ct. 1073, 62 L. Ed. 2d 791 (1980).

Next appellant argues that the trial court erred in refusing to strike language in the murder indictment referring to armed robbery as the aggravating circumstance. However, the trial judge found that stating the aggravating circumstance in the indictment merely alleged the circumstances making the murder subject to capital punishment. Appellant alleges that the crime stated in the indictment, murder committed while in the commission of robbery while armed with a deadly weapon, is no longer a crime in South Carolina because the 1974 version of Section 16-3-20 was declared unconstitutional; therefore, the indictment was improper. It was not prejudicial to inform the appellant of the aggravating circumstance which the State sought to prove. Appellant also argues that the indictment was improper for stating the aggravating circumstance because it, in effect, charged felony murder; thus the underlying felony (armed robbery) merged with the felony murder and could not be submitted to the jury as an aggravating circumstance in the sentencing phase of the trial. However, appellant concedes that the trial judge did not charge the felony murder rule. In addition, South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. State v. Judge, 208 S. C. 497, 38 S. E. 2d 715 (1946). Therefore, a statutory aggravating circumstance would remain a circumstance of the murder in a death penalty case regardless of whether the crime charged is murder or felony murder. There was no error in the indictment.

Appellant's next argument is that the trial judge erred in not charging the jury on involuntary manslaughter and felony murder. We disagree. The appellant can claim no prejudice by the failure of the court to charge the felony-murder doctrine which raises a presumption of malice on the part of the appellant. A charge of involuntary manslaughter would have been improper, also, as there was no evidence to support the charge. State v. Jones, 273 S. C. 723, 259 S. E. 2d 120 (1979). When we review a jury charge for error, we consider it as a whole in light of the evidence presented during the trial. State v. Hyman, Smith's Advance Sheet Opinion No. 21524, filed July 22, 1981; State v. Tucker, 273 S. C. 736, 259 S. E. 2d 414 (1979). There were two shots fired into the victim. Although there was testimony that the first shot fired by appellant was an "accident", there was also testimony that appellant fired the second shot deliberately to insure the victim's death. We have held that it is only necessary to charge a lesser included offense when there is evidence tending to show that only such lesser crime was committed. State v. Mickle, 273 S. C. 71, 254 S. E. 2d 295 (1979); State v. Funchess, 267 S. C. 427, 229 S. E. 2d 331 (1976). Therefore, it was not error to refuse to charge involuntary manslaughter when at least one of the two shots was fired deliberately.

Appellant contends that the trial court violated Section 16-3-20(E) in excusing four jurors for cause who were unalterably opposed to capital punishment. There is no error. The trial judge had a reasonable basis to conclude that the potential jurors could not faithfully carry out their duties under the law. State v. Hyman, supra; State v. Linder, supra; State v. Goolsby, 275 S. C. 110, 268 S. E. 2d 31 (1980). Appellant also claims that certain prospective jurors should have been disqualified for cause because of their general opinions in favor of the death penalty. A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence. Section 14-7-1020 of the Code. State v. Franklin, 267 S. C. 240, 226 S. E. 2d 896 (1976); State v. Watkins, 259 S. C. 185, 191 S. E. 2d 135 (1972). The testimony of these jurors demonstrated that each could

render an impartial verdict according to law; therefore, they were qualified. State v. Linder, supra; State v. Goolsby, supra; State v. Tyner, 273 S. C. 646, 258 S. E. 2d 359 (1979).

Appellant alleges that the trial judge erred by denying his motion for a change of venue due to pretrial publicity. Several days prior to appellant's trial, he and an inmate were involved in an altercation. Several newspapers, radio and television stations reported the incident. Several local attorneys testified for the appellant that they did not believe he could receive a fair trial in the Greenville area. The trial judge denied appellant's motion for a change of venue but stated that he would entertain the motion after voir dire examination if an impartial panel could not be obtained. After extensive voir dire proceedings, the trial judge concluded that an impartial jury had been seated. Where the trial judge bases his ruling on adequate voir dire examination of the jurors, his conclusion will not be disturbed absent extraordinary circumstances. State v. Neeley, 271 S. C. 33, 244 S. E. 2d 522 (1978); State v. Fowler, 266 S. C. 203, 222 S. E. 2d 297 (1976); State v. Crowe, 258 S. C. 258, 188 S. E. 2d 379, cert. denied, 409 U. S. 1077, 93 S. Ct. 691, 34 L. Ed. 2d 666 (1972). The record reveals that the trial judge took every precaution to insure the elimination of potential jurors that may have been prejudiced by the pretrial publicity, and the absence of prejudice on the part of those chosen to serve. No prejudice or abuse of discretion is shown.

Next appellant alleges that he was prejudiced by the lower court's refusal at a pretrial hearing to require a journalist to divulge her confidential informant concerning appellant's attack on a jailhouse inmate. The identity of the informant was irrelevant; it had no bearing on whether any of the prospective jurors were aware of the pretrial publicity.

Appellant also argues that his preliminary hearing was so structured that he was denied effective assistance of counsel. The State introduced only one witness at the hearing; a police officer read an accomplice's statement into the record. Appellant argues he was thus deprived of the right to cross examination and discovery of the State's witnesses. This issue was resolved against appellant in State v. Thompson, Smith's Advance Sheet, Opinion No. 21542, filed August 6, 1981, in which we held that the absence of direct testimony was not prejudicial to an accused since he was apprised of the nature of the State's evidence. See also, State v. Jones, supra.

Appellant also claims that the trial judge erred in not disqualifying for cause certain prospective jurors. One prospective juror initially indicated she thought law enforcement officers were more credible than ordinary people; however, she clearly stated to the court that she would follow its instructions concerning credibility of witnesses. Another prospective juror expressed misgivings about her opinion if the defendant chose not to testify; but once the court advised her more fully concerning the accused's right not to testify, she indicated that she would follow the court's instructions regarding the defendant's choice not to take the stand. The third prospective juror had been privy to erroneous information concerning appellant's case; he stated to the court that he had formed no opinion as to the guilt or innocence of the defendant and that he would give the defendant a fair trial based on the presented evidence. The trial court determined that all three of the challenged jurors were qualified. Because we do not have the benefit of observing first hand the character and demeanor of the jurors as did the trial judge, we rely on his wisdom and judgment unless the record firmly establishes an abuse of discretion. State v. Thomas, 268 S. C. 343, 234 S. E. 2d 16 (1977); DeLee v. Knight, 266 S. C. 103, 221 S. E. 2d 844 (1975). There was no abuse of discretion.

Next appellant argues that the jury panel should have been quashed because members of his race were systematically excluded from service on the grand jury and the petit jury. He alleges that the use of voter registration rolls in selecting the petit jury venire violated his rights under the Sixth Amendment of the U. S. Constitution and Article I, Section 14 of the South Carolina Constitution. This issue was resolved against the appellant in State v. Hyman, supra. Castaneda v. Partida, 430 U. S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977) held that an appellant must demonstrate that a disproportionate representation arose from a purposeful discrimination against an identifiable group in order to present a prima facie case on this issue. Appellant has made no showing that there was any systematic effort by the jury commissioners in Greenville County to exclude blacks.

Next, appellant argues that the trial judge erred in ruling that Section 14-7-1020 limited his attorneys on voir dire. He contends that Section 16-3-20(D), which allows defense counsel to examine the potential jurors, allows his counsel unlimited voir dire in a capital murder case. The method and scope of voir dire is within the trial court's discretion. State v. Tyner, supra; State v. Dawkins, 268 S. C. 110, 232 S. E. 2d 228 (1977). The record reveals that appellant's counsel was permitted to ask relevant questions. Appellant has not demonstrated that the trial court abused its discretion.

Appellant also argues that testimony by several witnesses that appellant was in South Carolina after the date he claimed to have left was an impermissible attack on his character. Although a state may not attack a criminal defendant's character unless he places it in issue, relevant evidence properly admissible for other purposes may not be excluded merely because it incidentally reflects on his character. State v. Thompson, supra; State v. Faulkner, 274 S. C. 619, 266 S. E. 2d 420 (1980). False and conflicting statements and attempts to run away are evidence of guilty knowledge and intent. State v. Thompson, supra; Town of Hartsville v. Munger, 93 S. C. 527, 77 S. E. 219 (1913). The statements were introduced to prove appellant attempted to avoid apprehension. There is no error.

During an accomplice's testimony at trial, the wife of the deceased victim had a "fainting spell". The trial judge excused the jury while the victim's wife was assisted from the courtroom. Appellant alleges that the trial judge should have granted a mistrial because the jury could have been in sight of the victim's wife as they were leaving through separate doors. We have held that the conduct of a trial is left largely to the discretion of the presiding judge, and this Court will not interfere unless the rights of the complaining party were abused or prejudiced. State v. Lee, 255 S. C. 309, 178 S. E. 2d 652 (1971); State v. Gidron, 211 S. C. 360, 45 S. E. 2d 587 (1947); State v. McGill, 191 S. C. 1, 3 S. E. 2d 257 (1939). No abuse of discretion appears from the record.

Finally, appellant argues the trial court erred in quashing the subpoena duces tecum issued for the Director of the South Carolina Department of Corrections, directing him to bring the electric chair to the courtroom. The appellant alleges that the process of electrocution is evidence in mitigation of the punishment and should have been presented to the jury under Section 16-3-20(B). Our Legislature has determined that capital punishment shall be imposed by electrocution. Section 24-3-530. The manner or nature of capital punishment has been removed from consideration of juries; the Death Penalty Statutory Complex focuses the sentencing authorities' attention on the nature of the crime and the characteristics of the individual defendant. State v. Shaw, supra. Therefore, the process of the punishment is irrelevant; the trial court committed no error in refusing to admit the evidence.

We have carefully reviewed the entire record (over 1450 pages) for prejudicial error overlooked by counsel. We find none, and therefore, affirm the conviction and sentence of death of appellant Albert "Bo" Thompson.

LEWIS, C.J., LITTLEJOHN, NESS, and GREGORY, JJ., concur.

APPENDIX B

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Albert "Bo" Thompson, ... Appellant.

Appeal From Greenville County
C. Anthony Harris, Judge

CORRECTED
Opinion No. 21596
Filed January 7, 1982

AFFIRMED

Chief Attorney John L. Sweeny, of S. C. Commission of Appellate Defense, of Columbia; and Thomas W. Greene and Jerry L. Taylor, both of Greenville, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorney General Lindy P. Funkhouser and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Solicitor William W. Wilkins, Jr., of Greenville, for respondent.

HARWELL, A. J.: Appellant Albert "Bo" Thompson was tried by a jury in Greenville County and convicted of armed robbery and murder. Upon recommendation of the jury, he was sentenced to death. This case consolidates Thompson's direct appeal and mandatory review of the death sentence.

On July 10, 1978, George Toubia was shot and killed during the armed robbery of his small grocery store near Simpsonville, South Carolina. Appellant Thompson and two accomplices were arrested for the crimes. One of the accomplices pled guilty to accessory to murder and armed robbery, and the other pled guilty to murder and armed robbery.

Appellant asserts his convictions should be reversed and that he should be allowed to enter a guilty plea in return for a life sentence because of pretrial plea negotiations. Appellant sought an injunction against the State to prevent it from seeking the death penalty; the motion was denied. Appellant argues he had an enforceable agreement with the State for a sentence of life imprisonment. The State asserts that no agreement was ever reached; that in response to appellant's proposal to plead guilty, the solicitor advised appellant's counsel that he would consider a guilty plea only upon a firm commitment by the accused and that he would discuss the matter with the victim's family before he reached a final decision.

Appellant's attempt to create a firm commitment out of plea negotiations has no merit. Santobello v. New York, 404 U. S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), states that "fundamental fairness" forbids the State from seeking the death penalty after plea negotiations. However, Santobello merely stands for the proposition that when an accused pleads guilty upon the promise of a prosecutor, the agreement must be fulfilled. Here, there was no promise made by the solicitor; there were merely negotiations.

Relying on Cooper v. United States, 594 F. 2d 12 (4th Cir. 1979), appellant argues that even though an express contract had not been reached, his expectations reasonably formed in reliance upon the honor of the government required that the State be enjoined from seeking the death penalty. In Cooper, a firmly advanced proposal had been made to the defendant by an Assistant U. S. Attorney but was withdrawn when the proposal was disapproved by the U. S. Attorney. The 4th Circuit Court of Appeals confined its holding as narrowly as possible to cases where the proposal was specific, unambiguous and made without any reservation. Any plea negotiations between appellant and the State were not specific or unambiguous; there were also two reservations: a firm commitment from the accused and a discussion with the victim's family.

Appellant excepts to the application of the Death Penalty Statute to his case. He asserts that S. C. Code Ann. 16-3-20(C) provides no guidelines for the weighing of aggravating and mitigating circumstances. He also argues that the scope of review of death penalty cases is too narrow (comparing only prior capital cases tried under the present death penalty statute) and therefore unconstitutional. Appellant contends that he has a right to access to the cases with which the Supreme Court compares each death sentence; however, Section 16-3-25 of the Code does not provide for the right. Next, he argues that the death penalty constitutes disproportionate punishment in his case. This argument is without merit. Upon entering Mr. Toubia's store to rob him, appellant immediately shot him once. Before leaving the store with the fruits of the crime, appellant shot him again.[1] Appellant also contends that the death penalty was applied arbitrarily and capriciously because it was not sought for his two accomplices. These issues were decided adversely to appellant in State v. Linder, Smith's Advance Sheet, Opinion No. 21452, May 14, 1981 and State v. Shaw, 273 S. C. 194, 255 S. E. 2d 799, cert. denied 444 U. S. 957, 100 S. Ct. 437, 62 L. Ed. 2d 329 (1979), petition for rehearing denied 444 U. S. 1027, 100 S. Ct. 694, 62 L. Ed. 2d 662 (1980), and cert. denied 444 U. S. 1026, 100 S. Ct. 690, 62 L. Ed. 2d 660, petition for rehearing denied 444 U. S. 1104, 100 S. Ct. 1073, 62 L. Ed. 2d 791 (1980).

Next appellant argues that the trial court erred in refusing to strike language in the murder indictment referring to armed robbery as the aggravating circumstance. However, the trial judge found that stating the aggravating circumstance in the indictment merely alleged the circumstances making the murder subject to capital punishment. Appellant alleges that the crime stated in the indictment, murder committed while in the commission of robbery while armed with a deadly weapon, is no longer a crime in South Carolina because the 1974 version of Section 16-3-20 was declared unconstitutional; therefore, the indictment was improper. It was not prejudicial to inform the appellant of the aggravating circumstance which the State sought to prove. Appellant also argues that the indictment was improper for stating the aggravating circumstance because it, in effect, charged felony murder; thus the underlying felony (armed robbery) merged with the felony murder and could not be submitted to the jury as an aggravating circumstance in the sentencing phase of the trial. However, appellant concedes that the trial judge did not charge the felony murder rule. In addition, South Carolina adheres to the common law rule of murder and makes no distinction between murder and felony murder. State v. Judge, 208 S. C. 497, 38 S. E. 2d 715 (1946). Therefore, a statutory aggravating circumstance would remain a circumstance of the murder in a death penalty case regardless of whether the crime charged is murder or felony murder. There was no error in the indictment.

Appellant's next argument is that the trial judge erred in not charging the jury on involuntary manslaughter and felony murder. We disagree. The appellant can claim no prejudice by the failure of the court to charge the felony-murder doctrine which raises a presumption of malice on the part of the appellant. A charge of involuntary manslaughter would have been improper, also, as there was no evidence to support the charge. State v. Jones, 273 S. C. 723, 259 S. E. 2d 120 (1979). When we review a jury charge for error, we consider it as a whole in light of the evidence presented during the trial. State v. Hyman, Smith's Advance Sheet Opinion No. 21524, filed July 22, 1981; State v. Tucker, 273 S. C. 736, 259 S. E. 2d 414 (1979). There were two shots fired into the victim. Although there was testimony that the first shot fired by appellant was an "accident", there was also testimony that appellant fired the second shot deliberately to insure the victim's death. We have held that it is only necessary to charge a lesser included offense when there is evidence tending to show that only such lesser crime was committed. State v. Mickle, 273 S. C. 71, 254 S. E. 2d 295 (1979); State v. Funchess, 267 S. C. 427, 229 S. E. 2d 331 (1976). Therefore, it was not error to refuse to charge involuntary manslaughter when at least one of the two shots was fired deliberately.

Appellant contends that the trial court violated Section 16-3-20(E) in excusing four jurors for cause who were unalterably opposed to capital punishment. There is no

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[1] In compliance with the mandate of §16-3-25(E) and considering both the crime and the defendant, we have determined that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. State v. Shaw, et al., 273 S.C. 194, 255 S.E.2d 799 (1979); State v. Hyman, ___S.C.___, 281 S.E.2d 209 (1981); State v. Gilbert, et al., Op. No. 21562, filed September 14, 1981. The transcripts, briefs and opinions in those cases used for comparison purposes are public records; thus, the defendant in fact has access to the same information available to the Court.

error. The trial judge had a reasonable basis to conclude that the potential jurors could not faithfully carry out their duties under the law. State v. Hyman, supra; State v. Linder, supra; State v. Goolsby, 275 S. C. 110, 268 S. E. 2d 31 (1980). Appellant also claims that certain prospective jurors should have been disqualified for cause because of their general opinions in favor of the death penalty. A juror's competence is within the trial judge's discretion and is not reviewable on appeal unless wholly unsupported by the evidence. Section 14-7-1020 of the Code. State v. Franklin, 267 S. C. 240, 226 S. E. 2d 896 (1976); State v. Watkins, 259 S. C. 185, 191 S. E. 2d 135 (1972). The testimony of these jurors demonstrated that each could render an impartial verdict according to law; therefore, they were qualified. State v. Linder, supra; State v. Goolsby, supra; State v. Tyner, 273 S. C. 646, 258 S. E. 2d 359 (1979).

Appellant alleges that the trial judge erred by denying his motion for a change of venue due to pretrial publicity. Several days prior to appellant's trial, he and an inmate were involved in an altercation. Several newspapers, radio and television stations reported the incident. Several local attorneys testified for the appellant that they did not believe he could receive a fair trial in the Greenville area. The trial judge denied appellant's motion for a change of venue but stated that he would entertain the motion after voir dire examination if an impartial panel could not be obtained. After extensive voir dire proceedings, the trial judge concluded that an impartial jury had been seated. Where the trial judge bases his ruling on adequate voir dire examination of the jurors, his conclusion will not be disturbed absent extraordinary circumstances. State v. Neeley, 271 S. C. 33, 244 S. E. 2d 522 (1978); State v. Fowler, 266 S. C. 203, 222 S. E. 2d 297 (1976); State v. Crowe, 258 S. C. 258, 188 S. E. 2d 379, cert. denied, 409 U. S. 1077, 93 S. Ct. 691, 34 L. Ed. 2d 666 (1972). The record reveals that the trial judge took every precaution to insure the elimination of potential jurors that may have been prejudiced by the pretrial publicity, and the absence of prejudice on the part of those chosen to serve. No prejudice or abuse of discretion is shown.

Next appellant alleges that he was prejudiced by the lower court's refusal at a pretrial hearing to require a journalist to divulge her confidential informant concerning appellant's attack on a jailhouse inmate. The identity of the informant was irrelevant; it had no bearing on whether any of the prospective jurors were aware of the pretrial publicity.

Appellant also argues that his preliminary hearing was so structured that he was denied effective assistance of counsel. The State introduced only one witness at the hearing; a police officer read an accomplice's statement into the record. Appellant argues he was thus deprived of the right to cross examination and discovery of the State's witnesses. This issue was resolved against appellant in State v. Thompson, Smith's Advance Sheet, Opinion No. 21542, filed August 6, 1981, in which we held that the absence of direct testimony was not prejudicial to an accused since he was apprised of the nature of the State's evidence. See also, State v. Jones, supra.

Appellant also claims that the trial judge erred in not disqualifying for cause certain prospective jurors. One prospective juror initially indicated she thought law enforcement officers were more credible than ordinary people; however, she clearly stated to the court that she would follow its instructions concerning credibility of witnesses. Another prospective juror expressed misgivings about her opinion if the defendant chose not to testify; but once the court advised her more fully concerning the accused's right not to testify, she indicated that she would follow the court's instructions regarding the defendant's choice not to take the stand. The third prospective juror had been privy to erroneous information concerning appellant's case; he stated to the court that he had formed no opinion as to the guilt or innocence of the defendant and that he would give the defendant a fair trial based on the presented evidence. The trial court determined that all three of the challenged jurors were qualified. Because we do not have the benefit of observing first hand the character and demeanor of the jurors as did the trial judge, we rely on his wisdom and judgment unless the record firmly establishes an abuse of discretion. State v. Thomas, 268 S. C. 343, 234 S. E. 2d 16 (1977); DeLee v. Knight, 266 S. C. 103, 221 S. E. 2d 844 (1975). There was no abuse of discretion.

Next appellant argues that the jury panel should have been quashed because members of his race were systematically excluded from service on the grand jury and the petit jury. He alleges that the use of voter registration rolls in selecting the petit jury venire violated his rights under the Sixth Amendment of the U. S. Constitution

and Article I, Section 14 of the South Carolina Constitution. This issue was resolved against the appellant in State v. Hyman, supra. Castaneda v. Partida, 430 U. S. 482, 97 S. Ct. 1272, 51 L. Ed. 2d 498 (1977), held that an appellant must demonstrate that a disproportionate representation arose from a purposeful discrimination against an identifiable group in order to present a prima facie case on this issue. Appellant has made no showing that there was any systematic effort by the jury commissioners in Greenville County to exclude b[illegible]s.

Next, appellant argues that the trial judge erred in ruling that Section 14-7-1020 limited his attorneys on voir dire. He contends that Section 16-3-20(D), which allows defense counsel to examine the potential jurors, allows his counsel unlimited voir dire in a capital murder case. The method and scope of voir dire is within the trial court's discretion. State v. Tyner, supra; State v. Dawkins, 268 S. C. 110, 232 S. E. 2d 228 (1977). The record reveals that appellant's counsel was permitted to ask relevant questions. Appellant has not demonstrated that the trial court abused its discretion.

Appellant also argues that testimony by several witnesses that appellant was in South Carolina after the date he claimed to have left was an impermissible attack on his character. Although a state may not attack a criminal defendant's character unless he places it in issue, relevant evidence properly admissible for other purposes may not be excluded merely because it incidentally reflects on his character. State v. Thompson, supra; State v. Faulkner, 274 S. C. 619, 266 S. E. 2d 420 (1980). False and conflicting statements and attempts to run away are evidence of guilty knowledge and intent. State v. Thompson, supra; Town of Hartsville v. Munger, 93 S. C. 527, 77 S. E. 219 (1913). The statements were introduced to prove appellant attempted to avoid apprehension. There is no error.

During an accomplice's testimony at trial, the wife of the deceased victim had a "fainting spell". The trial judge excused the jury while the victim's wife was assisted from the courtroom. Appellant alleges that the trial judge should have granted a mistrial because the jury could have been in sight of the victim's wife as they were leaving through separate doors. We have held that the conduct of a trial is left largely to the discretion of the presiding judge, and this Court will not interfere unless the rights of the complaining party were abused or prejudiced. State v. Lee, 255 S. C. 309, 178 S. E. 2d 652 (1971); State v. Gidron, 211 S. C. 360, 45 S. E. 2d 587 (1947); State v. McGill, 191 S. C. 1, 3 S. E. 2d 257 (1939). No abuse of discretion appears from the record.

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We have carefully reviewed the entire record (over 1450 pages) for prejudicial error overlooked by counsel. We find none, and therefore, affirm the conviction and sentence of death of appellant Albert "Bo" Thompson.

LEWIS, C.J., LITTLEJOHN, NESS and GREGORY, JJ., concur.

The Supreme Court of South Carolina

The State,

Respondent,

v.

Albert "Bo" Thompson,

Appellant.

ORDER

Appellant Albert "Bo" Thompson has petitioned for a rehearing of his appeal in which this Court affirmed his conviction and sentence of death.

The petition points out that the Court failed to list in its opinion the cases which were used for comparison in considering whether appellant's sentence was excessive or disproportionate to the penalty imposed in similar cases. To correct this inadvertent omission, the following modification should be made to the opinion in State v. Albert "Bo" Thompson, Op. No. 21596, filed November 23, 1981.

On page four (4), first paragraph, line eleven (11), after the word "again.", add the number one (1). At the bottom of page four (4), add the following footnote:

> [1]In compliance with the mandate of §16-3-25(E) and considering both the crime and the defendant, we have determined that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. State v. Shaw, et al., 273 S.C. 194, 255 S.E.2d 799 (1979); State v. Hyman, ____S.C.____, 281 S.E.2d 209 (1981); State v. Gilbert, et al., Op. No. 21562, filed September 14, 1981. The transcripts, briefs and opinions in those cases used for comparison purposes are public records; thus, the defendant in fact has access to the same information available to the Court.

In all other respects, appellant's Petition for Rehearing is denied.

Appellant's Motion for Stay of Remittitur in the above matter is granted for a period of sixty (60) days pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court, and thereafter until final disposition is made by that Court.

C.J.

A.J.

A.J.

Columbia, S. C.

December 22, 1981

CERTIFIED TRUE COPY.

Deputy Clerk, S. C. Supreme Court

§ 16–3–20. Punishment for murder.

Whoever is guilty of murder under the following circumstances shall suffer the penalty of death:

(1) Murder committed while in the commission of the following crimes or acts: (a) rape; (b) assault with intent to ravish; (c) kidnapping; (d) burglary; (e) robbery while armed with a deadly weapon; (f) larceny with use of a deadly weapon; (g) housebreaking; (h) killing by poison; (i) lying in wait.

(2) Murder committed for hire based on some consideration of value.

(3) Murder of a law-enforcement officer or correctional officer while acting in the line of duty.

(4) The person convicted of committing the murder had previously been convicted of murder, or was convicted of committing more than one murder.

(5) Murder that is willful, deliberate and premeditated.

Whoever is guilty of murder under any other circumstance shall suffer the penalty of life imprisonment. *Provided, however,* that notwithstanding the provisions of this section, under no circumstances shall a female who is pregnant with child be executed so long as she is in that condition.

HISTORY: 1962 Code § 16-52; 1952 Code § 16-52; 1942 Code § 1102; 1932 Code § 1102; Cr. C. '22 § 2; Cr. C. '12 § 136; Cr. C. '02 § 109; G. S. 2454; R. S. 109; 1868 (14) 175; 1894 (21) 785; 1974 (58) 2361.

§ 16–3–25. Punishment for murder: review by Supreme Court of imposition of death penalty.

(A) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of South Carolina. The clerk of the trial court, within ten days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of South Carolina together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of South Carolina.

(B) The Supreme Court of South Carolina shall consider the punishment as well as any errors by way of appeal.

(C) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in § 16–3–20, and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(D) Both the defendant and the State shall have the right to submit briefs within the time provided by the court and to present oral arguments to the court.

(E) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of South Carolina in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration. If the court finds error prejudicial to the defendant in the sentencing proceeding conducted by the trial judge before the trial jury as outlined under Item (B) of § 16–3–20, the court may set the sentence aside and remand the case for a resentencing proceeding to be conducted by the same or a different trial judge and by a new jury impaneled for such purpose. In the resentencing proceeding, the new jury, if the defendant does not waive the right of a trial jury for the resentencing proceeding, shall hear evidence in extenuation, mitigation or aggravation of the punishment in addition to any evidence admitted in the defendant's first trial relating to guilt for the particular crime for which the defendant has been found guilty.

(F) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on all legal errors, the factual substantiation of the verdict, and the validity of the sentence.

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

NO. 81 6235

ALBERT "BO" THOMPSON,

PETITIONER,

V

STATE OF SOUTH CAROLINA,

RESPONDENT.

AFFIDAVIT OF ALBERT "BO" THOMPSON IN SUPPORT OF MOTION TO PROCEED IN FORMA PAUPERIS

I, ALBERT "BO" THOMPSON, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? "No."

   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

   b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

   July 1978 - $416.00 per month

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NO. 81 6235

ALBERT "BO" THOMPSON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

Petitioner, Albert "Bo" Thompson, respectfully moves this Court for leave to proceed herein in forma pauperis, in accordance with the provisions of Title 28, United States Code, Section 1915, and Rule 46 of this Court. The Affidavit of Petitioner in support of this Motion is attached hereto.

Presented herewith is a Petition for Writ of Certiorari of the moving party.

Respectfully Submitted,

THOMAS W. GREENE
JERRY L. TAYLOR

BY: _____
Attorneys for Petitioner

12 Lavinia Avenue
Greenville, South Carolina 29601

February 17, 1982.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? "No."

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings account? "No."

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? "No."

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. "None."

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Albert B Thompson
ALBERT "BO" THOMPSON

SWORN to and subscribed before me
this 5th day of February, 1982.

D. J. Taylor (LS)
Notary Public for South Carolina
My Commission Expires: 4-21-90

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-6235

RECEIVED
MAR 22 1982
OFFICE OF THE CLERK
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ALBERT "BO" THOMPSON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL R. McLEOD
Attorney General

BRIAN P. GIBBES
Senior Assistant Attorney General

Post Office Box 11549
Columbia, South Carolina 29211

ATTORNEYS FOR RESPONDENT.

CERTIFICATE OF SERVICE

THE UNDERSIGNED HEREBY CERTIFIES THAT A TRUE COPY OF Brief in Opposition HAS BEEN SERVED UPON OPPOSING COUNSEL BY MAILING 1 COPIES IN AN ENVELOPE PROPERLY ADDRESSED WITH POSTAGE PREPAID THIS 19th DAY OF March, 1982.

Brian P. Gibbes
ATTORNEY FOR Respondent

SWORN TO BEFORE ME THIS 19th DAY OF March, 1982.

Karen Y. Newton (L.S.)
Notary Public for South Carolina
My Commission Expires 9-17-86

QUESTIONS PRESENTED

I.

Was the South Carolina Death Penalty statute applied in Petitioner's case in violation of the Eighth Amendment?

II.

Did the lower court err in excusing for cause jurors who could not abide by their oaths because of their opposition to capital punishment?

III.

Did the lower court properly conclude that no legal prejudice resulted from pretrial publicity in the case?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No.

ALBERT "BO" THOMPSON, Petitioner,

versus

STATE OF SOUTH CAROLINA, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion Number 21596, filed November 23, 1981, as reproduced in Petitioner's Appendix A at pages 3-6 and the corrected opinion as Appendix B directly thereafter.

JURISDICTION

Respondent does not question the Court's jurisdiction in the proceeding.

QUESTIONS PRESENTED

I.

Was the South Carolina Death Penalty statute applied in Petitioner's case in violation of the Eighth Amendment?

II.

Did the lower court err in excusing for cause jurors who could not abide by their oaths because of their opposition to capital punishment?

III.

Did the lower court properly conclude that no legal prejudice resulted from pretrial publicity in the case?

ARGUMENT

The South Carolina Death Penalty statute was not applied in Petitioner's case in violation of the Eighth Amendment.

This matter came before the trial court by a motion on behalf of the defendant seeking an injunction against the State to prevent it from seeking the death penalty in the case. (Tr. p. 1404-p. 1408). The lower court held a hearing on the motion on July 21, 1980. Although Petitioner's counsel alleged in their motion that the Solicitor had made an offer of a life sentence in return for a plea of guilty, the Solicitor had a different view of the facts. It appears undisputed from the record that there was some discussion about a negotiated plea at the time Notice of Intent to Seek the Death Penalty was served upon opposing counsel. (Tr. p. 1281, lines 9-21). During these initial discussions, Appellant and his counsel took the position that he would not plead guilty to any charge. (There was an armed robbery charge against Petitioner pending in Pickens County at the time). (Tr. p. 3, lines 19-25). After another of Petitioner's convictions in Pickens County, counsel advised the Solicitor that they were in a position to plead their client guilty. (Tr. p. 1282, lines 4-8). In response to this proposal, the Solicitor advised counsel that he would consider a plea of guilty only upon a firm commitment by the accused,

and that he would also discuss the matter with the victim's family before coming to a final decision. (Tr. p. 1282, lines 8-16). One of the Solicitor's reasons for consulting with the family was the very real possibility that the victim's family members had indicated an extreme reluctance to go through a trial and testify because of the emotional strain. (Tr. p. 1284, lines 7-14). Although the Solicitor indicated a personal desire to dispose of the case expeditiously because of certain personal commitments with the United States Army, it seems clear from arguments on behalf of both parties that there was no firm commitment on behalf of the State to recommend a life sentence in exchange for a plea of guilty. (Tr. p. 1282, line 9-p. 1286, line 15).

The lower court denied Petitioner's motion for an injunction, finding as a matter of fact that no firm commitment had been made by the State concerning the consequences of an offer by the defendant to plead guilty. (Tr. p. 1293, line 2-p. 1294, line 19). It should be noted that, after the lower court denied Petitioner's motion for an injunction, it granted Petitioner's counsel a continuance in order to prepare for trial inasmuch as they had been retained in the case for 34 days. (Tr. p. 1341, lines 20-24). The continuance was given until September 22, 1980). (Tr. p. ii).

Respondent would respectfully submit that Petitioner has no constitutional right to a plea bargain. Weatherford v. Bursey, 429 U.S. 545, 51 L. Ed. 2d 30, 97 S. Ct. 837 (1977). He has demonstrated no prejudice to his rights under the South Carolina or Federal Constitutions arising from the

conduct of plea negotiations in this case. The fact that he obtained a continuance from July 21, 1980, until September 22, 1980 would belie any such assertion and, therefore, his rights to a fundamentally fair trial were preserved.

II.

The lower court did not err in excusing for cause jurors who could not abide by their oaths because of their opposition to capital punishment.

On this issue Petitioner claims that four jurors were erroneously excused for cause under the rule of Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968). Generally, the question of the partiality of a juror is addressed to the sound discretion of the trial court. South Carolina Code Section 14-7-1020 (1976). State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978); State v. Jones, 268 S.C. 227, 233 S.E. 2d 287 (1977); State v. Franklin, 267 S.C. 240, 226 S.E. 2d 896 (1976). The decision of a trial court on this issue is not reviewable on appeal unless wholly unsupported by the evidence. State v. Watkins, 259 S.C. 185, 191 S.E. 2d 135 (1972), vac. on oth'r gr'nds., 413 U.S. 905, 37 L. Ed. 2d 1016, 93 S. Ct. 3035. In this connection it should be noted that a general objection to the death penalty is no reason for a trial judge to excuse veniremen for cause, rather, it must be a belief which would prevent the potential juror from rendering an impartial decision as required by the juror's oath. Adams v. Texas, 448 U.S. ___, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980); Witherspoon v. Illinois, supra; State v. Goolsby, ___ S.C. ___,

268 S.E. 2d 31 (1980). Respondent would respectfully submit that there was sufficient evidence to support the lower court's finding that these jurors should be disqualified for cause.

In support of his argument on this claim Petitioner examines, out of context, testimony of the prospective jurors which he claims were improperly disqualified. However, this Court has clearly stated that the voir dire examination of a prospective juror in a death penalty case must be viewed in its entirety to determine the juror's unwillingness to vote for the death penalty under any circumstances. State v. Tyner, 273 S.C. 646, 258 S.E. 2d 559 (1979). As to the jurors subject to Petitioner's objection we would simply cite the following portions of the Transcript of Record to show that the trial court properly applied the standards set forth in Tyner and in State v. Goolsby, __ S.C. ___, 268 S.E. 2d 31 (1980);

Allen J. Ravan
(Tr. p. 751, line 17-p. 753, line 9).

Samuel P. Clayton
(Tr. p. 292, line 4-p. 299, line 1).

Elizabeth F. League
(Tr. p. 371, line 2-p. 372, line 8; p. 374, line 7-p. 375, line 14).

Dorothy H. White
(Tr. p. 646, line 9-p. 649, line 10).

The testimony of these jurors indicated that they did not simply entertain a "general objection" to the death penalty, but, rather, could not personally participate impartially in the decision to consider whether a defendant should live or die.

Petitioner's argument that disqualification for cause can be limited to jurors who could not render a verdict of guilty has been resolved against him in the South Carolina Supreme Court's opinion in State v. Linder, ___ S.C. ___, 278 S.E. 2d 335 (1981).

III.

The lower court properly concluded that no legal prejudice resulted from pretrial publicity in the case.

On this issue Petitioner claims he was entitled to a change of venue because of publicity arising from an altercation which he had with an inmate several days prior to the September 22, 1980 trial. Petitioner produced testimony showing the content of the report concerning the incident. (Tr. p. 2, line 17-p. 41, line 2). Also, counsel introduced into evidence a film tape showing Petitioner, his attorney, and a plain clothes officer during a television interview of Petitioner's counsel concerning the incident. (Tr. p. 86, line 18-p. 110, line 22). Also, Petitioner submitted testimony of Mr. Thomas Nessler, Mr. Theo W. Mithcell, and Mr. Stephen Henry on the question of whether the pretrial publicity was so extensive as to require a change of venue. (Tr. p. 44, line 24-p. 55, line 19; p. 61, line 7-p. 67, line 2). The defense also introduced affidavits of various people concerning the television coverage of this incident. (Tr. p. 111, lines 1-14). After considering the evidence, the lower court made the following findings:

> This publicity which you are referring to in no way makes any reference to the crime for which this defendant is to go on trial today. It merely states almost parenthetically that he was charged with this offense and will go on trial.
>
> By the same token, the publicity about which--the crime about which the publicity is extant is not basically inflammatory, it is not suggested that the defendant has committed some heinous offense and it in no way editorializes. It is a reasonably, straight forward, factual reporting as news media can ever do, that is, reporting what someone else told them.
>
> * * *
>
> For the record, I find that the newspaper articles are extremely low key. They are not headlined. The defendant's name is not even mentioned in the headlines, it just says inmate charged with assault. There is no great embellishment in the articles, suggestive of the fact that there is a desperate, hardened person whom we need to do something with. (Tr. p. 118, line 18-p. 119, line 3; p. 119, lines 12-17).

Consequently, the trial judge ruled that he could not conclude, without the benefit of placing the jury on its voir dire, that the pretrial publicity so infected the community that Petitioner could not receive a fair trial. (Tr. p. 120, line 12-p. 121, line 15).

It should also be noted that the witnesses who testified before the court on behalf of Petitioner's motion could not conclude that the publicity was so prejudicial as to obviate the necessity of placing potential jurors on their voir dire. (Tr. p. 48, lines 9-21; p. 52, lines 9-15; p. 66, lines 12-24). In fact, the trial judge carefully examined potential jurors to determine the extent of their knowledge of pretrial publicity and the affect such publicity would have upon their ability to

be impartial jurors. (Tr. p. 216, line 15-p. 217, line 6; p. 243, line 18-p. 244, line 11; p. 250, lines 5-20; p. 263, lines 12-25; p. 277, lines. 9-18; p. 290, lines 4-23; p. 301, line 4-p. 302, line 6; p. 322, lines 2-23; p. 334, lines 4-25; p. 354, lines 6-17; p. 361, lines 5-20; p. 369, line 23-p. 370, line 11; p. 377, lines 7-25; p. 400, line 14-p. 403, line 6; p. 414, lines 10-17; p. 427, lines 2-7; p. 446, line 15-p. 447, line 3; p. 445, lines 12-19; p. 469, lines 19-p. 470, lines 16; p. 491, line 2-p. 492, line 6; p. 506, line 3-p. 507, line 3; p. 518, lines 2-23; p. 529, lines 2-15; p. 541, lines 2-10). After considerable examination of the jury during voir dire proceedings, the trial judge found that the venire was not, in fact, infected with prejudicial pretrial publicity. (Tr. p. 695, line 17-p. 697, line 8). Only two potential jurors indicated such a knowledge of the jailhouse assault as to prompt the exercise of the trial judge's sound discretion in excusing them for cause. (Tr. p. 553, line 17-p. 573, line 9; p. 631, line 3-p. 643, line 5).

"Motions for change of venue are addressed to the sound discretion of the trial judge, and his decision will not be reversed absent an abuse of discretion." State v. Tyner, 273 S.C. 646, 649, 258 S.E. 2d 559, 561 (1979), citing State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978); State v. Valenti, 265 S.C. 380, 218 S.E. 2d 726 (1975). Where a defedant alleges that pretrial publicity has violated his right to a fair trial "normally he must show the jurors were aware of the publicity

and that the publicity constituted legal prejudice." State v. Fowler, 266 S.C. 203, 207, 222 S.E. 2d 497, 499 (1976). Respondent further respectfully submits that the following rule of law is controlling on this issue:

> Where the trial judge bases his ruling on adequate voir dire examination of the jurors, his conclusion that the objectivity of the jury panel has not been polluted with outside influence will not be disturbed absent extraordinary circumstances. State v. Neeley, 271 S.C. 33, 244 S.E. 2d 522 (1978), citing State v. Fowler, supra; State v. Crowe, 258 S.C. 258, 188 S.E. 2d 379, cert. den. 409 U.S. 1077, 93 S. Ct. 691, 34 L. Ed. 2d 666 (1972).

The reason for this principle of law lies in the fact that the trial judge is most capable of considering the demeanor and attitude of the juror as he or she responds to voir dire examination. As stated by this Court in DeLee v. Knight, 266 S.C. 103, 112, 221 S.E. 2d 844, 847 (1975), quoting State v. Middleton, 207 S.C. 478, 497, 36 S.E. 2d 742, 749 (1946), "'the manner and bearing of the juror, nature's stamp of character on form and countenance are evidential exhibits for the circuit judge which may indicate the juror's real attitude more than his words.'" In this regard it should also be noted that a juror is not automatically disqualified simply because he or she has been exposed to adverse publicity concerning a particular defendant. "'It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" State v. Fowler, supra, 266 S.C. at 207, 222 S.E. 2d at 499 (1976), quoting Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 1643, 66 L. Ed. 751 (1961).

Respondent respectfully submits that this issue is resolved against Petitioner by the South Carolina Supreme Court's decision

in State v. Fowler, supra, where the Court upheld the denial of a motion for a change of venue where Appellant submitted for consideration eleven (11) articles printed in newspapers with wide circulation in the county, each concerned with reports of the murder for which Appellant was charged and the resulting manhunt conducted by law enforcement officers to capture Appellant and another suspect. The record showed that the local sheriff had been interviewed by radio and television stations regarding the investigation of the case and the victim of the crime, who was a highway patrolman. The defendant had submitted affidavits of six local attorneys who concluded that the defendant could not obtain a fair and impartial trial in the area. The State presented no counter affidavits or testimony in opposition to the motion for a change of venue. The South Carolina Supreme Court ruled that the trial judge properly resolved any issue as to prejudice cause by pretrial publicity in the conduct of its voir dire examination. There, as in this case, the trial judge was satisfied that each juror was free from disabling prejudices. Petitioner's contention is clearly without merit.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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